

**SENATE JUDICIARY COMMITTEE**  
**Senator Hannah-Beth Jackson, Chair**  
**2019-2020 Regular Session**

SB 472 (Caballero)  
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AM

**SUBJECT**

Earned income access service providers

**DIGEST**

This bill provides that the delivery of earned but unpaid income to a consumer by an earned income access service provider is not to be construed as a credit transaction. The bill requires an earned income access (EIA) service provider to comply with various requirements when delivering earned but unpaid income to a consumer, including prohibiting fees from exceeding \$14 for a monthly pay period or prorated amount for shorter periods. The bill authorizes an EIA service provider to contract with an earned income obligor to provide this service to the obligor's employees or to contract directly with a consumer. The bill requires an EIA service provider to comply with specified bonding and insurance requirements and authorizes a person damaged by an EIA service provider to file a claim on those bonds and insurance. The bill provides that a person who violates these provisions is subject to civil suit in a court of competent jurisdiction.

**EXECUTIVE SUMMARY**

EIA service providers are a relatively new industry that allow employees and independent contractors to access wages they have already earned but have not been paid prior to their scheduled payday for a fee. This bill is intended to provide a statutory framework to govern this industry and provide some protections to consumers.

The bill is sponsored by PayActiv, which is an EIA service provider. There is one individual in opposition. The bill passed the Senate Banking and Financial Institutions Committee on a vote of 7-0.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Provides that no person shall issue in payment of wages due, or to become due, or as an advance on wages to be earned any order, check, draft, note, memorandum, or other acknowledgement of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, as specified. (Lab. Code § 212.)
- 2) Provides that an assignment of wages, earned or to be earned, is not valid unless certain conditions are satisfied, including that the assignment is contained in a separate written instrument, signed by the person by whom the wages or salary have been earned or are to be earned, and identifying specifically the transaction to which the assignment relates. (Lab. Code § 300.)
- 3) Provides for the licensure and regulation of persons engaging in the business of money transmission in this state by the Commissioner of Business Oversight (CBO) under the Money Transmission Act (MTA), as specified. (Fin. Code §§ 2000 et. seq.)
  - a) The MTA defines “money transmission” as all of the following: selling or issuing payment instruments; selling or issuing stored value; receiving money for transmission. (Fin. Code §2003(q).)
  - b) The MTA requires a licensee to at all times own eligible securities having an aggregate market value computed in accordance with United States generally accepted accounting principles of not less than the aggregate amount of all of its outstanding payment instruments and stored value obligations issued or sold in the United States and all outstanding money received for transmission in the United States. (Fin. Code §2081.)
- 4) Provides for the licensure and regulation of finance lenders and brokers by the CBO under the California Financing Law (CFL), as specified. (Fin. Code §§ 22000 et. seq.)
  - a) The CFL defines “finance lender” as any person who is engaged in the business of making consumer loans or making commercial loans. (Fin. Code § 22009.)
  - b) The CFL defined “broker” as any person who is engaged in the business of negotiating or performing any act as broker in connection with loans made by a finance lender.(Fin. Code § 22004.)
  - c) The CFL defines “consumer loan” as either of the following: (Fin. Code § 22001(b) & (c).)
    - i. a loan, whether secured by either real or personal property, or both, or unsecured, the proceeds of which are intended by the borrower for use primarily for personal, family, or household purposes; or (Fin. Code § 22203.)

- ii. a loan of a principal amount of less \$5,000 the proceeds of which are intended by the borrower for use primarily for other than personal, family, or household purposes. (Fin. Code § 22204.)
  - d) The CFL defines “commercial loan” as a loan of a principal amount of five thousand dollars (\$5,000) or more, or any loan under an open-end credit program, whether secured by either real or personal property, or both, or unsecured, the proceeds of which are intended by the borrower for use primarily for other than personal, family, or household purposes. (Fin. Code § 22502.)
- 5) Provides for the licensure and regulation of a person who offers, originates, or makes a deferred deposit transaction, arranges a deferred deposit transaction for a deferred deposit originator, acts as an agent for a deferred deposit originator, or assists a deferred deposit originator in the origination of a deferred deposit transaction without first obtaining a license from the CBO under the California Deferred Deposit Transaction Law (CDDTL). (Fin. Code §§ 23000 et. seq.)
- a) Defines “deferred deposit transaction” as a transaction whereby a person defers depositing a customer’s personal check until a specific date, pursuant to a written agreement for a fee or other charge. (Fin Code. § 23001(a).)
  - b) Defines “deferred deposit originator” as a person who offers, originates, or makes a deferred deposit transaction. (Fin Code. § 23001(f).)

This bill:

- 1) States it is the intent of the Legislature that this act accomplish all of the following:
  - a) Protect the interests of consumers in this state who avail themselves of earned income access services.
  - b) Provide for the safe, efficient, and orderly conduct of the business of EIA service providers.
  - c) Provide legal certainty to EIA service providers by establishing a regulatory framework for their lawful conduct in this state.
  - d) Maintain public confidence in EIA service providers.
- 2) Defines the following terms:
  - a) “Delivery” means the delivery of funds to a consumer by an earned income access service provider.
  - b) “Consumer” means a natural person.
  - c) “Earned income” means moneys that a consumer has represented, and the EIA service provider has reasonably determined, have accrued to the benefit of that consumer for services rendered to an earned income obligor. “Earned income” includes, but is not limited to, “accrued wages” as defined in Supplement I to Part 1041 of Title 12 of the Code of Federal Regulations as it read on January 1, 2019.

- d) "Earned but unpaid income" means earned income that has not yet been paid to the consumer by an earned income obligor.
  - e) "Earned income access services" means the delivery of funds to a consumer that represents earned but unpaid income.
  - f) "Earned income obligor" means:
    - i. an employer; or
    - ii. another person who is contractually obligated to pay the consumer any sum of money on an hourly, project-based, piecework, or other basis for labor or services provided by the consumer to or on behalf of the other person.
    - iii. An "earned income obligor" does not include a customer of an earned income obligor or other third party whose obligation to make any payment to a consumer is based solely on the consumer's agency relationship with the earned income obligor.
- 3) Provides that the delivery of earned but unpaid income to a consumer by an EIA service provider is not to be construed as a credit transaction because the funds provided to the consumer are those that the consumer has already earned.
- 4) Provides that the imposition of one or more fees on a consumer who opts to use the services of an EIA service provider does not represent a violation of Section 212 of the Labor Code provided that the consumer is informed of the right to receive the full amount of the consumer's wages, without discount, if the consumer waits until the regular payday.
- 5) Requires an EIA service provider to comply with all of the following requirements when delivering earned but unpaid income to a consumer.
- a) Permits a consumer to cancel participation in the EIA program at any time without incurring a charge for doing so.
    - i. An EIA service provider must provide each consumer with a document, receipt of which the consumer acknowledges, in writing that informs the consumer of the consumer's rights under the program and includes instructions for how to cancel participation in the program.
    - ii. This document must be separate from any EIA services agreement the consumer is asked to sign, must be written in a minimum 10-point font size and in language intended to be understood by a layperson.
    - iii. Each consumer must be given the option of receiving a hard copy, or an electronic copy of this document, at a designated address, when enrolling in an earned income access program.
  - b) Delivery of funds to a consumer is to be made via any means mutually agreeable to the consumer and the earned income access service provider.

- c) Prohibits an EIA service provider from delivering funds more than three separate times during each pay period.
  - d) The amount of the earned income delivered must not exceed 50 percent of the amount of the consumer's gross earned but unpaid income as of the date and time of the consumer request.
  - e) Provide in its contract with an obligor, a consumer, or both, as applicable, that there is no liability on the part of the consumer in connection with the receipt of earned but unpaid income other than payment of participation fees and repayment of funds advanced under an EIA service agreement or program.
  - f) Provide in its contract with an obligor that the obligor is prohibited from charging a consumer, directly or indirectly, for participating in an EIA program.
- 6) Fees charged to the consumer in connection with the provision of EIA services must comply with the following:
  - a) Fees must be limited to the following:
    - i. a periodic charge for participating in the EIA program or in any benefit or enhancement program that includes an earned income access program; or
    - ii. a charge for funds delivery that is not based on the amount of the delivery; or
    - iii. a combination of those charges.
  - b) The total amount of fees charged is prohibited from exceeding \$14 for a monthly pay period or the prorated amount for shorter pay periods.
  - c) Fees charged to the consumer are prohibited from varying based on the manner in which the consumer elects to receive the funds.
- 7) An EIA service provider may offer EIA services through either or both of the following:
  - a) A contractual arrangement with an earned income obligor in which the provider delivers earned income to the consumer prior to the date on which the obligor is scheduled to pay the consumer, and the obligor deducts the amount of the earned income delivered by the provider to the consumer from the consumer's next paycheck. If EIA services are offered in this manner, the obligor is prohibited from directly passing on to the consumer the cost of offering the services but may offer the EIA services as part of an optional service package for which a fee is charged by the EIA service provider.
  - b) A contractual arrangement with a consumer that permits the EIA service provider to deliver earned income directly to the consumer and to be repaid directly by the consumer via a means mutually acceptable to the consumer and provider.

- 8) Authorizes an earned income obligor to share information with the EIA service provider pertaining to the obligor's accrued and expected obligations to the consumer if the obligor is notified by an EIA service provider that it has entered into an arrangement with a consumer and the consumer consents.
- 9) Prohibits a person engaged in business as an EIA service provider from doing any of the following:
  - a) Require a consumer to:
    - i. open or maintain a demand deposit account at a particular depository institution; or
    - ii. close a demand deposit account at a particular depository institution; or
    - iii. open or maintain a direct wage deposit account at any depository institution.
  - b) Attempt to collect, either directly or through a third party, or sell or transfer to a third party the right to collect, funds from a consumer other than the authorized fees or funds advanced to the consumer.
  - c) Report to a consumer reporting agency concerning the inability of an EIA service provider to debit a consumer's deposit account in the amount legally due to the EIA service provider.
  - d) Provide in a contract with either an obligor or a consumer that there may be liability on the part of the consumer arising out of a delivery of earned income other than for payment of participation fees and repayment of funds advanced to the consumer.
  - e) Initiate a payment transfer from a consumer's account after the provider has attempted to initiate three consecutive failed payment transfers from that account, except as provided.
  - f) Initiate any draft against a consumer's deposit account or other asset account without first notifying the consumer, at least two days before the date of each draft, of the amount due and the date the draft will be made.
  - g) Make any material misrepresentations concerning any earned income access service that are intended to mislead.
  - h) Pursue a continued or flagrant course of misrepresentation or make false statements through advertising or other courses of action.
  - i) Fail, within a reasonable time, to account for any moneys belonging to others that may be in the possession of, or under control of, the provider.
  - j) Engage in conduct constituting fraudulent or dishonest dealings.
  - k) Commit a crime involving fraud, misrepresentation, deceit, embezzlement, misappropriation of funds, robbery, or theft.
  - l) Materially fail to fulfill its contractual duties to a consumer or an obligor, unless that failure is due to circumstances beyond the control of the person engaging in business as an earned income access service provider.

- 10) Requires a person who engages in business as an EIA service provider to comply at all times with the following, provides that these requirements are independent of one another, and provides that an action taken to satisfy one of these requirements does not satisfy any of the other requirements:
- a) Maintain a minimum net worth, excluding assets that exist to satisfy the requirements in (b) or (c), of at least \$250,000 as determined by generally accepted accounting standards.
  - b) Maintain a fidelity bond or bonds in an amount not less than \$250,000 executed by an insurer authorized to do business in this state or an eligible surplus line insurer. In the alternative, a provider may deposit an amount of cash or securities or irrevocable letters of credit in an amount not less than \$250,000 in an insured account at a depository institution of the provider's choice. Interest on that amount shall accrue to the provider.
  - c) Maintain a policy of errors and omissions insurance in an amount not less than \$250,000, executed by an insurer authorized to do business in this state or an eligible surplus line. In the alternative, a provider may deposit an amount of cash or securities or irrevocable letters of credit in an amount not less \$250,000 in an insured account at a depository institution of the provider's choice. Interest on that amount shall accrue to the provider.
- 11) Authorizes a person claiming to have sustained damage from an EIA service provider in violation of these requirements to file a claim on the required bonds, deposits, or letters of credit to recover the damages subject to the terms and conditions of the bonds, deposits, or letters of credit.
- 12) Provides that a person who violates these provisions is subject to civil suit in a court of competent jurisdiction.

### COMMENTS

#### 1. Stated need for the bill

The author writes:

For years, the legislature has been trying to clamp down on predatory payday lending, and until recently there has not been a safer alternative to address the very real need of people accessing their money before payday. SB 472 seeks to create statutory clarity so earned income access programs can continue to be a prudent and less costly alternative to payday lending. Earned income access is a socially responsible alternative for consumers that simply allows them to access a portion of the wages that they have already earned before their next payday. These programs have been proven to reduce the demand for payday loans, and do so far more cheaply and with less risk for consumers.

The sponsor of the bill, PayActiv, writes:

Earned income access programs are an innovative new approach to help Californians better manage their finances. EIA programs provide a socially responsible, fiscally viable alternative for consumers that simply allows them to access a portion of the income that they have already earned before their next pay day. The programs do not have financial access barriers that have historically hindered some consumers from fully realizing their financial goals but instead give California's workers a sense of autonomy and control over their finances. By only tapping a portion of the money already owed to them, users with immediate cash flow needs between paychecks can avoid expensive and risky alternatives — such as high interest short term loans, debt, the speculative risk of advances against future earnings, and high late fees on monthly bills and other forms of credit.

## 2. EIA service providers

EIA service providers are a relatively new industry that has arisen as an alternative to payday lenders and loans. Essentially, these companies offer employees and independent contractors access to wages they have already earned but have not yet been paid for a fee. According to information provided by the author and sponsor, there are at least six companies currently offering this service to consumers in the United States: PayActiv, Even, DailyPay, Earnin, FlexWage, and ZayZoon. The individual business models of these companies vary.

Some of these companies have an employer based model where they contract with an employer to provide this service to the employer's employees or independent contractors. Under this model, an employee or independent contractor elects to use the service, which is generally available via an app on a mobile device, and the employer agrees to provide the service provider with information regarding the employee's earned income to facilitate the transaction. If permitted under state law, the employer deducts the amount of earned but unpaid income delivered to the employee from the employee's next pay check and delivers that amount to the service provider. In states where this is not allowed, the service provider debits the employees bank account. There is usually a fee for the service and often times also a fee for the delivery of funds. The fee can be paid by the employer but in most cases is paid by the employee or independent contractor, and often times is deducted from the employee's paycheck as well.

The other business model is a direct-to-consumer model, where a service provider contracts with the consumer directly to offer this service. Under this model, a service provider may obtain information regarding a consumer's income and attendance from a payroll company or directly from the consumer. The service provider delivers the earned but unpaid income directly to the consumer and debits the consumer's bank



account on or after the consumer's next payday. Fees under this model are always paid for by the consumer. Earnin is a company that uses this business model.

Fees charged vary by service provider. PayActiv charges a flat fee per pay period of \$5 for a two-week or longer period and \$3 for a weekly pay period. DailyPay charges a fee based on the delivery method chosen. For example, for instant access the fee is \$2.99 and for next-day delivery the fee is \$1.25. Some service providers offer other financial wellness services in addition to advancing wages, including financial counseling, budgeting and saving tools, and bill pay services. Earnin claims it does not charge any fees or interest but allows users to tip what they believe is fair.<sup>1</sup>

The amount of income a consumer is allowed to access also varies by company. For example DailyPay allows workers to access their pay daily and all of their pay if needed; however, generally those using the service access 44 percent of their overall pay.<sup>2</sup> PayActiv allows consumers to access up to 50 percent of earned wages up to \$500 per pay period.

### 3. Need for small-dollar lending

Though estimates vary, it has been reported that “[n]early 80 percent of American workers (78 percent) say they’re living paycheck to paycheck, according to a 2017 report by employment website CareerBuilder.<sup>3</sup> Women are particularly vulnerable: 81 percent of them report living paycheck to paycheck, compared with 75 percent of men.”<sup>4</sup> Compounding this problem is that “today’s real average wage (that is, the wage after accounting for inflation) has about the same purchasing power it did 40 years ago.”<sup>5</sup> According to the most recent Federal Reserve Board Survey of Household Economics and Decisionmaking, four in ten Americans lack the savings to cover a \$400 emergency expense.<sup>6</sup>

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<sup>1</sup> Crosman, *A payday lender in disguise? New York investigates the Earning app*, American Banker (Apr. 3, 2019), available at <https://www.americanbanker.com/news/a-payday-lender-in-disguise-new-york-investigates-the-earnin-app> (as of Apr. 27, 2019).

<sup>2</sup> Zielinski, *New Instant Pay Mobile Apps Remake Payday*, SHRM (Jan. 8, 2018), available at <https://www.shrm.org/resourcesandtools/hr-topics/technology/pages/new-apps-remake-payday.aspx> (as of Apr. 26, 2019).

<sup>3</sup> CareerBuilder <http://press.careerbuilder.com/2017-08-24-Living-Paycheck-to-Paycheck-is-a-Way-of-Life-for-Majority-of-U-S-Workers-According-to-New-CareerBuilder-Survey> (as of Apr. 25, 2019).

<sup>4</sup> Martin, *The government shutdown spotlights a bigger issue: 78% of US workers live paycheck to paycheck*, CNBC (Jan. 9, 2019), available at <https://www.cnbc.com/2019/01/09/shutdown-highlights-that-4-in-5-us-workers-live-paycheck-to-paycheck.html> (as of Apr. 25, 2019).

<sup>5</sup> Desilver, *For most U.S. workers, real wages have barely budged in decades*, Pew Research Center (Aug. 7, 2018), available at <https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/> (as of Apr. 25, 2019).

<sup>6</sup> Fed. Reserve, *Report on the Economic Well-Being of U.S. Households in 2017 - May 2018* (Jun. 2018) available at <https://www.federalreserve.gov/publications/2018-economic-well-being-of-us-households-in-2017-dealing-with-unexpected-expenses.htm> (as of Apr. 25, 2019).

Often when an unexpected expense arises between pay periods, many people living paycheck to paycheck turn to payday lenders to access funds quickly. Payday lenders have been contentiously debated for years. “Consumer advocates have argued that because 80 percent of [payday] loans are renewed or are rolled over within two weeks, people find themselves unable to pay their loans back even as the interest they owe continues to mount” and can end up in a debt spiral as “the average payday loan comes complete with a 391 percent annual percentage rate (APR).”<sup>7</sup> In 2017, the then Director of the Consumer Financial Protection Bureau Richard Cordray published rules that were intended to curb many of the most egregious practices in payday lending; however, under the current Administration these rules are likely to be revised in a way that would lead to fewer protections for borrowers.<sup>8</sup>

There have been efforts to encourage banks to provide small-dollar lending, but these efforts have not proven fruitful:

The Office of the Comptroller of the Currency issued a bulletin in May [of 2018] encouraging national banks to get back into the small-dollar lending market in a bid to take business from payday lenders. The Federal Deposit Insurance Corp. is seeking public comment on a potential similar move. But most mainstream financial institutions are holding off on small-dollar offerings.<sup>9</sup>

EIA service providers state that they are offering their services to address this very real challenge being faced by many individuals living paycheck to paycheck and that their services are a less risky alternative to payday lenders. For example, in a study done by researchers at Harvard University, it was concluded that a \$200 advance of income from PayActiv was 16.7 percent of the cost of a payday loan and 14.3 percent of the cost of a typical bank overdraft fee.<sup>10</sup> The study further found that the analysis might even be overstating the cost as “typically bank customers incur several \$35 overdraft charges when overdrawn due to the difficulty in managing timing of check clearances and bank practices which often seek to maximize the number of checks for which a checking account will have insufficient funds.”<sup>11</sup>

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<sup>7</sup> Thomhave, *Thanks to Trump, Payday Lenders Will Keep on Merrily Bilking the Poor*, The American Prospect (Feb. 7, 2019), available at <https://prospect.org/article/thanks-trump-payday-lenders-will-keep-on-merrily-bilking-poor> (as of Apr. 25, 2019).

<sup>8</sup> *Id.*

<sup>9</sup> Beyoud, *Fintechs Step Into Payday Alternatives Where Banks Fear to Tread*, Bloomberg Law (Dec. 18, 2018), available at <https://news.bloomberglaw.com/banking-law/fintechs-step-into-payday-alternatives-where-banks-fear-to-tread> (as of Apr. 25, 2019).

<sup>10</sup> Baker and Kumar, *The Power of the Salary Link: Assessing the benefits of Employer-Sponsored Fintech Liquidity and Credit Solutions for Low-Wage Working Americans and their Employers*, M-RCBG Associate Working Paper Series No. 88, available at [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/88\\_final.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/88_final.pdf) (as of Apr. 26, 2019).

<sup>11</sup> *Id.*

However, the New York Department of Financial Services recently launched an investigation into Earnin:

Linda Lacewell, acting superintendent of the New York Department of Financial Services, subpoenaed the company on [March 24, 2018,] for 21 different categories of records, according to a source familiar with the investigation. That includes records of the names of Earnin's New York customers, the size and number of their transactions, and orders to convert the "tip" amounts it has requested for advances to annual percentage rates, or APRs — and to assume that the fees count as interest, the source said.<sup>12</sup>

The New York Post also reported that "Earnin encouraged users to leave a tip of anywhere between zero and \$14 on a \$100 weekly loan. Users who don't leave a tip appear to have their credit restricted. Meanwhile, a \$14 tip would equate to a 730-percent APR — nearly 30 times higher than New York's 25 percent cap."<sup>13</sup>

#### 4. Policy discussion

It is clear that there is a need for small-dollar lending in the United States and arguably EIA service providers may be the better alternative to payday loans. The question becomes what is the best way to regulate this emerging industry without hampering its ability to innovate and also providing protection for consumers using these products.

##### *a. Employer based model vs. direct-to-consumer model*

The bill in print provides that EIA services are not credit. The bill also allows for both the employer model and direct-to-consumer model. Though there are potential issues with both models, the direct-to-consumer model seems to be the one that is most problematic. A consumer could potentially use multiple direct-to-consumer services without each service provider being aware of this, leading to the potential situation where a consumer could take out more than their entire paycheck or the authorized 50 percent in the bill. Under an employer based model the potential of this happening seems less likely. Lauren Saunders, associate director of the National Consumer Law Center, was quoted in the American Banker as saying:

True early wage access providers are companies that have agreements with the employer and are integrated with payroll and are not making loans and seeking repayment from the customer. Earnin seems to be trying to look like they're giving

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<sup>12</sup> Dugan, *Cash-advance app Earning gets subpoenaed by NY regulator: source*, New York Post (March 28, 2019), available at <https://nypost.com/2019/03/28/cash-advance-app-earnin-gets-subpoenaed-by-ny-regulator-source/> (as of Apr. 27, 2019).

<sup>13</sup> *Id.*

you your pay, but they have no relationship with the employer and in my mind it's a payday loan.<sup>14</sup>

The Center for Responsible Lending, National Consumer Law Center, and the Western Center on Law and Poverty expressed their general support regarding the potential of accessing earned but unpaid income in helping consumers deal with expenses, but they had various concerns about provisions in the bill, including allowing a direct-to-consumer model:

A bill that is focused on providing workers access to *pay, not loans*, must draw a clear distinction between products that are provided through a direct connection to the employer and payroll, on the one hand, and those that are offered directly to consumers and are repaid by consumers, on the other. While some direct-to-consumer products may be affordable and beneficial alternatives to payday loans, if the consumer has the obligation to repay an advance, there is no basis to exempt that transaction from credit laws. The mere fact that the lender may be aware that the consumer has earned but unpaid income is immaterial to the determination of whether credit is involved; payday lenders already verify anticipated income streams and could use the same methods that some fintechs use to assess what earnings have already accrued. Moreover, advances that are repaid automatically from consumers' bank accounts also carry risks of overdraft and nonsufficient funds (NSF) fees.

There does seem merit to the argument that these two models are very different and that the direct-to-consumer model seems more like a payday loan than the employer based model. However, many workers do not work for traditional employers. For example someone who provides child care or other services may not have an employer that could provide this service. If only the employer based model was authorized, how would that affect the ability of these non-traditional workers to access paid but unearned income? Would these workers have to use payday loans? Is there a way to allow both models but place more regulations on the direct-to-consumer model? These are policy issues that need to be explored in order to ensure those who truly need access to this service can obtain it.

*b. Pay period, limitations on number of transactions, and fees*

Under the existing provisions of the bill, a consumer would be limited to receiving earned but unpaid income more than three times during a pay period, and the amount being received may not exceed 50 percent of a consumer's gross earned but unpaid income as of the date and time of the consumer request. A "pay period" is not defined

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<sup>14</sup> Crossman, *A payday lender in disguise? New York investigates the Earnin app*, American Banker (Apr. 3, 2019), available at <https://www.americanbanker.com/news/a-payday-lender-in-disguise-new-york-investigates-the-earnin-app> (as of Apr. 26, 2019).

under the bill, so would an Uber driver who is paid daily be able to receive three advances every day? Gross income may be easier to determine but net income may be the more appropriate measure to fully account for the consumer's take-home pay after taxes and any other deductions from the consumer's paycheck to ensure they have enough funds to cover the advance of income.

The Center for Responsible Lending, National Consumer Law Center, and the Western Center on Law and Poverty write that the bill should be amended to:

Limit earned income access to 50 percent of net income, not gross as currently in the bill. A reasonable estimate of taxes and other standard deductions is acceptable, but providers should also be required to take into account wage garnishments for debts or child support in order to ensure that the consumer does not end up with a zero paycheck or a debt that must be repaid.

The bill limits fees charged from exceeding \$14 in a monthly pay period and provides that only a periodic fee for providing the service or a fee for delivery, or both, is allowed. The bill also provides that fees for delivery could not vary based upon the method of delivery chosen.

Though not in official opposition, DailyPay, an EIA service provider that uses the employer based model, expresses concerns about various provisions in the bill writing:

[O]ur observation is that the language used in the bill does not protect consumers – rather, this bill is drafted in a manner to protect one provider's business model, and is not inclusive of the broader set of considerations important to consumers in using such a benefit. These provisions drafted, in turn, reflect features and limitations that are wholly arbitrary and not supported by any data or measurement of consumer behavior that we can observe.

Specifically, DailyPay points to the 50 percent limitation on accessing earned income, limiting access to three times a pay period, capping the fees at \$14, and not allowing different charges for different delivery methods. The criticism that these limitations mirror the business model of PayActiv, the sponsor of the bill, are not unfounded.

On the other hand, the Center for Responsible Lending, National Consumer Law Center, and the Western Center on Law and Poverty believe that the monthly fee should be capped at \$5 and that the access of earned but unpaid income should be limited to six instances per calendar year and no more than three consecutive pay periods. These consumer groups also believe that a weaning and cooling off mechanism should be required.

*c. Regulatory and licensing model vs. a statutory framework*

The bill in print states it is intended to provide protection for consumers and provides that a person who violates the provisions of the bill is subject to civil suit in a court of competent jurisdiction. With the prevalence of arbitration clauses in consumer products, it is very unlikely that consumers would be able to bring a suit in court to vindicate their rights and would instead be forced to arbitrate their claims. The bill has various notice requirements and prohibits various practices, including attempting to collect, either directly or through a third party, or sell or transfer to a third party the right to collect, funds from a consumer other than the authorized fees and funds advanced.

The bill in print does not provide for a licensing and regulatory model like the MTA, CFL, or CDDTL. Instead, it is more akin to SB 1007 (Machado, Ch. 708, Stats. 2008), which took a similar approach to providing a statutory framework for exchange facilitators. EIA service providers do not neatly fit within the definitions or regulatory structures of the MTA, CFL, or CDDTL. The consumer groups believe that these providers should be regulated under the MTA; however, their business model is not exactly like those of money transmitters.

The Senate Banking and Financial Institutions Committee analysis reflected this and reads:

Any new licensing law entails a certain expense. Regulations must be promulgated, licensing staff hired, applications processed, and examination staff hired and trained. These costs can be substantial, and spreading them across a small number of relatively new (and relatively small) companies could put those companies out of business or significantly stunt their growth. These costs could also create a barrier to entry for new companies wishing to enter the market.<sup>15</sup>

Taking these things into consideration, it seems that the better approach to ensure that consumers are protected would be to provide a licensing and regulatory framework similar to the MTA, CFL, and CDDTL. There are ways to design the regulatory scheme so as to not hamper innovation in this area, such as delaying implementation of licensure or allowing temporary licenses to be issued until the licensing agency is able to issue regular licenses, which was done with the cannabis licensing laws. In addition, a civil penalty should be added to ensure compliance with the provisions of the bill and to ensure consumer protections.

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<sup>15</sup> Cal. Sen. Banking and Fin. Institutions Cmt., SB 472 (Caballero, 2019) Analysis at p. 6.

5. Statements in opposition, of concern, and support if amended

The sponsor of the bill, PayActiv, writes:

[T]hese consumer-directed programs reduce the demand for other, riskier and more costly options for temporarily strapped consumers. In addition, earned income access avoids the potential shortcomings of other alternatives, namely the more expensive cost of some loans, and the often risky and problematic consequences of a failed transaction. Earned income access provides an exciting new alternative for consumers. Rather than attempting to reduce the supply of expensive and often risky alternative forms of money, earned income access programs provide a less expensive, less risky and socially responsible alternative that can serve to reduce the demand for such money.

There is one individual in opposition to the bill. He states that he has “been involved in developing, operating, scaling and refining the first Earned Income Service platform.” He writes:

Unfortunately, SB 472 currently benefits Earned Income Service Providers by prohibiting early wage transactions as being considered as a noncredit financial service eliminating any protections, disclosures, and regulations enacted to protect Californians accessing credit financial services. Further, it also fails to include consumer protections preventing payment plans for wages not yet earned, the rolling over of the balance not fully repaid, or prohibit the enticement of consumers of utilizing predatory instruments such as prepaid cards.

Though not in official opposition, the National Payroll Reporting Consortium (NPRC) expresses concerns about the bill, and writes:

We believe this is an important issue that warrants careful, thoughtful and deliberative discussions amongst *all* stakeholders so that public policy can be achieved to meet the mutual needs of employers, workers, payroll processing and service providers, and others. NPRC is concerned that the approach taken by SB 472 narrowly establishes the current practices of one service provider into law as the statewide standard. NPRC believes that a more deliberative and comprehensive discussion involving all stakeholders should occur regarding the issues raised by SB 472.

This same concern was expressed by DailyPay as explained above in Comment 4.

The Center for Responsible Lending, National Consumer Law Center, and the Western Center on Law and Poverty state they support the bill if amended, but have many concerns about the bill in print, as expressed above in Comment 4.

Their concerns include the following:

- Only products that are fully integrated with the employer should be covered by the bill.
- No product that debits a consumer's account should be allowed.
- Products that provide access to earning to pay for a product or service should be excluded.
- Employers should be prohibited from requiring consumers to receive earned income through a particular account.
- The provisions in subdivision (g) to (l) of Section 60007 of the Financial Code are narrowly drawn and already covered under other existing laws and therefore should be removed from the bill.
- These providers should be regulated under the MTA and the bonding and insurance requirements should be increased to the same for money transmitters.
- Various other technical concerns.

#### 6. Amendments

There are many policy issues that need to be addressed regarding EIA service providers. Without the bill, these providers will still be operating but may be doing so in a grey area. Accordingly, a balance needs to be struck to allow these service providers to offer this potentially promising alternative to payday loans to meet the very real demand for access to funds while also ensuring that consumers are protected.

In order to address some of the issues raised above, the author may wish to amend the bill to: provide a civil penalty for violation of the bill's provisions; specify that these services are not credit under state law; require notice to the consumer to be in writing and a minimum of 12-point font; remove subdivision (g) to (l) of Section 60007 of the Financial Code; specify that a consumer cannot be required to sign up for any other service or product; authorize only one debit of a consumer's account; and make clarifying, technical changes to the definitions.

The specific amendments are as follows:

##### Amendment 1

Add subdivision (b) to Section 60008 of the Financial Code to read:

(b) A person who violates this division shall be subject to a civil penalty of up to two thousand dollars (\$2,000) for each violation.

##### Amendment 2

Amend subdivision (a) of Section 60002 of the Financial Code as follows:



(a) Notwithstanding any law, the delivery of earned but unpaid income to a consumer by an earned income access service provider as set forth in this division shall not be construed as a credit transaction *under state law* because the funds provided to the consumer are those that the consumer has already earned.

Amendment 3

Amend subdivision (b) of Section 60002 of the Financial Code as follows:

(b) The imposition of one or more fees on a consumer who opts to use the services of an earned income access service provider shall not represent a violation of Section 212 of the Labor Code provided that the consumer is informed *in writing* of the right to receive the full amount of the consumer's wages, without discount, if the consumer waits until the regular payday.

Amendment 4

Amend subdivision (a) of Section 60003 of the Financial Code as follows:

(a) An earned income access service provider shall permit a consumer to cancel participation in the earned income access program at any time without incurring a charge for doing so. An earned income access service provider shall provide each consumer with a document, receipt of which the consumer acknowledges, in writing that informs the consumer of the consumer's rights under the program and includes instructions for how to cancel participation in the program. This document shall be separate from any earned income access services agreement the consumer is asked to sign, shall be written in a minimum *12-point* font size, and shall be written in language intended to be understood by a layperson. Each consumer shall be given the option of receiving a hard copy, or an electronic copy of this document, at a designated address, when enrolling in an earned income access program.

Amendment 5

Delete subdivisions (g) to (l), inclusive, of Section 60007 of the Financial Code:

~~(g) Make any material misrepresentations concerning any earned income access service that are intended to mislead.~~

~~(h) Pursue a continued or flagrant course of misrepresentation or make false statements through advertising or other courses of action.~~

~~(i) Fail, within a reasonable time, to account for any moneys belonging to others that may be in the possession of, or under control of, the provider.~~

~~(j) Engage in conduct constituting fraudulent or dishonest dealings.~~

~~(k) Commit a crime involving fraud, misrepresentation, deceit, embezzlement, misappropriation of funds, robbery, or theft.~~

~~(l) Materially fail to fulfill its contractual duties to a consumer or an obligor, unless that failure is due to circumstances beyond the control of the person engaging in business as an earned income access service provider.~~

Amendment 6

Amend paragraph (4) of subdivision (a) of Section 60007 of the Financial Code as follows:

~~(4) Sign up for any other product or service that entails an additional cost as a condition of offering earned income access services to a consumer.~~ *service.*

Amendment 7

Amend subdivision (e) of Section 60007 of the Financial Code as follows:

~~(e) Initiate a payment transfer from a consumer's account after the provider has attempted to initiate three consecutive~~ *receives notice of a failed payment transfer* ~~transfers~~ from that account. For purposes of this subdivision, a payment transfer is deemed to have failed when it results in a return indicating that the consumer's account lacks sufficient funds. Notwithstanding this prohibition, a provider may initiate additional payment transfers from a consumer's account after ~~three consecutive~~ *a failed* ~~payment transfers transfer~~ if the additional payment transfers are authorized by the ~~consumer following the failed attempts.~~ *consumer.*

Amendment 8

Amend Section 60001 of the Financial Code as follows:

**60001.** For purposes of this division, the following definitions shall apply:

(a) "Delivery" means the delivery of funds to a consumer by an earned income access service provider.

(b) "Consumer" means a natural person.

(c) "Earned income" means moneys that a consumer has represented, and the earned income access service provider has reasonably determined, have accrued to the benefit of that consumer for services rendered to an earned income obligor. "Earned income" includes, but is not limited to, "accrued wages" as defined in Supplement I to Part 1041 of Title 12 of the Code of Federal Regulations as it read on January 1, 2019.

(d) "Earned but unpaid income" means earned income that has not yet been paid to the consumer by an earned income obligor.

(e) “Earned income access services” means the delivery of funds to a consumer that represent earned but unpaid income.

(f) “Earned income access service provider” or “*provider*” means any person that is engaged in the business of delivering earned but unpaid income to a consumer in California.

(g) “Earned income obligor” or “*obligor*” means either of the following:

(1) An employer.

(2) Another person who is contractually obligated to pay the consumer any sum of money on an hourly, project-based, piecework, or other basis for labor or services provided by the consumer to or on behalf of the other ~~person~~ *person, including an independent contractor*.

(h) An “earned income obligor” does not include a customer of an earned income obligor or other third party whose obligation to make any payment to a consumer is based solely on the consumer’s agency relationship with the earned income obligor.

### SUPPORT

PayActiv

### OPPOSITION

Pedro Salinas Ibarra

### RELATED LEGISLATION

#### Pending Legislation:

AB 539 (Limón, 2019) authorizes a licensee under the CFL, with respect to a loan of a bona fide principal amount of \$2,500 or more but less than \$10,000, to contract for or receive charges at a rate not exceeding an annual simple interest rate of 36 percent plus the Federal Funds Rate and authorizes and an administrative fee in addition to these charges. This bill is currently pending in the Assembly Appropriations Committee.

#### Prior Legislation:

SB 1007 (Machado, Ch. 708, Stats. 2008) provided a statutory framework to govern exchange facilitators in this state, as specified.

### PRIOR VOTES

Senate Banking and Financial Institutions Committee (Ayes 7, Noes 0)

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